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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ALVIN R. DUNHAM COMPANY, AND FRED S. LARSON, ALIAS FRED M. LARSON,

Respondents.

BRIEF OF PETITIONER IN OPPOSITION TO MOTIONS TO DISMISS WRIT AND AFFIRM JUDGMENT.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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I.

AS TO THE MOTION TO DISMISS.

Respondents' motion to dismiss the writ is palpably frivolous. It is based upon alleged misstatements of fact in petitioner's application for the writ.

The statements which are said to be misleading are that "they (defendant and his employees) entered the car," and "defendant was in the car from the time they (defendant and his employees) opened it until the summons was served."

The evidence in the case in undisputed and was largely

stipulated. In fact it was stipulated in open court "that no question of fact was involved in this cause and that the court may dispose of same as a matter of law and direct a verdict for the party whom the court found entitled thereto." (Rec., 5.)

The car of apples in question was placed on "one of the public delivery tracks of the defendant (Railway Company) at said station (Ironwood, Michigan) used by consignees for unloading freight that was received in car lot shipments." (Rec., 2.) The defendant (Larson) presented and delivered to petitioner's agent at Ironwood the original order bill of lading for the apples, paid the freight charges on the same, and gave to such agent a receipt for the car of apples. (Rec., 12.)

The car contained 24,000 pounds of apples (Rec., 8) and at the time of the service of the writ of garnishment one-fourth of the contents of the car had been removed by the defendant (Larson). (Rec., 2, 12.)

After surrendering the bill of lading and paying the freight charges the defendant Larson hired a drayman with a truck, went to the car and started unloading the apples (Rec., 4, 12), and had unloaded one-fourth of the contents of the car before the writ of garnishment was served. (Rec., 2, 12.)

The defendant Larson testified:

> "Q. How did you move them out of the car?
>
> A. We put them in baskets and carried them out. I hired a drayman with an automobile truck. I wasn't there all the time while they were moving those apples. *I was there from the time that we opened the car until the summons was served.*" (Rec., 4.)

If this does not support the statements that "they entered the car" and that "defendant (Larson) was in

the car from the time they opened it until the summons was served," it is impossible to understand the English language.

Mr. Larson said, "We opened the car" (Rec., 4); "we put them in baskets and carried them out." From whence did they carry them out if not from the inside of the car where they were located? To where did they carry the apples if not to the truck standing outside? To put the apples in baskets required work inside the car where the apples were. To unload one-fourth of the contents of the car took from 8:15 A. M. (Rec., 5) to 9:45 A. M. (Rec., 12). Mr. Larson said he "was there from the time that they opened the car until the summons was served." During that time, he said, "we put them in baskets and carried them out." It is a logical and almost necessary inference that Larson was in the car during all that time, except perhaps during the moments he was on the truck depositing the apples from the baskets. If these brief intervals of time while Larson was in and out of the car carrying the baskets are what respondent refers to as the basis of his motion, he may have the benefit of it.

But respondent grasps at what it deems must have been an hiatus in Larson's occupancy of the car,—during the brief time the car was shifted on the sidetrack. After Larson started to unload the car it was moved to permit of the placement of another car. (Rec., 13.) There is nothing in the record to indicate that Larson or his drayman did not remain in the car during this switching movement. It was testified that during such movement "those in the car would either stop unloading and get out, or stop unloading and ride in the car." (Rec., 14.) This, together with Larson's testimony that he was there from the time he opened the car until the summons was

served, rather indicates that he stayed with the car while it was being switched.

But let us assume that he did not and that for the 3 to 5 minutes (Rec., 14) that it took to switch the car he remained at the truck. Does that indicate a relinquishment of possession,—a surrender of custody,—a redelivery back to the railroad company? If so then there was a renewal of possession by Larson, a retaking of custody, and a redelivery to him of the contents when the switching was concluded. The switching movement was concluded before nine o'clock in the morning (Rec., 13) and the summons was not served until 9:45 A. M. (Rec., 12) and Larson was "there all the time until the summons was served."

We are perhaps dignifying respondents' motion by even so much of reference to the record. We would not do so but for the charges made that our statement of facts was "misleading" and contained "bald misstatements of the facts."

We resent and challenge these assertions and submit the record as the best answer to them.

Furthermore, it is immaterial in fact and in law whether or not the defendant Larson was inside the car all the time before service of the writ in garnishment. It is undisputably established that he was "there," at the car, all of such time; that he was engaged in unloading the apples from 8:15 A. M. until the writ was served at 9:45 A. M.; and that he had unloaded one-fourth of the contents of the car before the writ was served. This is sufficient for the purposes of this case to establish delivery of the apples to him and that he was in the actual custody and possession of them. To assert under such a state of facts that the writ of certiorari was granted because of the statement in our application that Larson was inside the car all of such time is frivolous.

II.

AS TO THE MOTION TO AFFIRM.

Respondent bases its motion to affirm upon two grounds:

(1) That the writ was taken for delay; and

(2) That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

As to the first ground respondent does not urge a single reason to indicate any desire on petitioner's part for delay. Why should petitioner desire to delay the payment of a judgment which is presumably carrying interest? What have we to gain by delay? We are earnestly prosecuting this proceeding for a determination of an important principle of common carrier liability. We seek no delay and are ready to submit our case to the consideration of this court at the earliest date.

As to the second ground we submit that a case which involves the liability of a common carrier as garnishee after it has done all that its contract and the law requires of it, does not depend upon any "unsubstantial question."

The question involved in this case has never been passed upon by this court. It presents an important element in the law of common carriers and upon its determination depends the future attitude and practice of common carriers in reference to garnishments. If carriers are to be held liable as garnishees under facts like these they must radically change their practices with reference to the delivery of shipments, and must devise some means by which they can protect themselves against the consignee to whom the shipment has been delivered.

Thus far no such method of protection has been suggested, nor have we been able to find any.

It is conceded that petitioner did all that the law and its contract of shipment required of it in this case. The consignee likewise did all that was required of him. Everything that would constitute delivery in the law was done, yet we have been held liable as garnishee with no available relief other than a tortious taking of the goods from the owner.

To assert that such a situation presents an unsubstantial controversy discloses the weakness of a case which depends not upon logic but accusation.

Nothing has been advanced in support of these motions that was not fully presented and argued in the brief of respondent in opposition to our petition for a writ of certiorari. Every consideration of fact or of law presented can be fully and properly determined only after full presentation and argument on the merits.

Petitioner submits that both motions should be denied.

Respectfully submitted,

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Emmett Lady

Counsel for Petitioner.